

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES ALLEN KINNEY,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

CASE NO. 2:24-cv-01680-DGE-DWC

REPORT AND RECOMMENDATION

Noting Date: November 6, 2024

The District Court has referred this federal habeas action to United States Magistrate Judge David W. Christel. Petitioner James Allen Kinney proceeding *pro se*, has filed a motion to proceed *in forma pauperis* (“IFP”) and a proposed § 2254 habeas petition. Dkt. 1, 1-1. Upon review of his proposed petition, the Court concludes the petition is second or successive and Petitioner is therefore not entitled to habeas relief.

Accordingly, the undersigned declines to order service upon Respondent pursuant to Rule 4 of the Rules Governing § 2254 cases (“Habeas Rules”), recommends the proposed petition (Dkt. 1-1) be dismissed without prejudice for lack of jurisdiction and further recommends the IFP motion (Dkt. 1) be denied as moot.

1       **I. Background**

2           Petitioner is currently in custody at Stafford Creek Corrections Center, where he is  
3 serving a sentence of life without parole arising out of his 2002 state court conviction for  
4 aggravated first degree murder entered in *State of Washington v. James Allen Kinney*, Superior  
5 Court of Whatcom County Cause No. 98-1-01049-8 (filed Oct. 8, 1998). Although his precise  
6 grounds for relief are difficult to discern, Petitioner contends that he was acting as a special  
7 investigator for former United States President Ronald Reagan when he engaged in the  
8 underlying conduct for his state-court conviction. *See* Dkt. 1-1 at 6.

9           From 2008 until present, Petitioner filed at least three separate federal habeas actions  
10 challenging the same state court conviction. *See Kinney v. Sinclair*, No. 08-cv-489-RAJ (W.D.  
11 Wash. filed Mar. 27, 2008); *Kinney v. Setter, et al.*, No. 2:13-cv-00441-JCC (W.D. Wash. filed  
12 Mar. 11, 2013); *Kinney v. Key*, No. 2:17-cv-01040-RAJ (W.D. Wash. filed Jul. 7, 2017)  
13 (hereinafter “first,” “second,” and “third petition,” respectively).

14           After Petitioner filed his first petition in March 2008, he moved for voluntary dismissal,  
15 and the first petition was dismissed without prejudice. *Kinney*, No. 08-cv-489-RAJ, at Dkts. 37,  
16 41 (dismissed on Oct. 16, 2008).

17           His second petition was filed in March 2013. The Court assessed the second petition on  
18 the merits and concluded the grounds raised therein were untimely, unexhausted, procedurally  
19 barred, and nonviable. *Kinney*, No. 2:13-cv-00441-JCC, at Dkts. 7, 10, 11. The second petition  
20 was dismissed with prejudice on May 29, 2013. *Id.*

21           Petitioner filed the third petition in July 2017. *Kinney*, No. 2:17-cv-01040-RAJ, Dkt. 1.  
22 After finding the third petition was second or successive, the Court concluded it was without  
23 jurisdiction to consider the claims raised therein and referred the matter to the Ninth Circuit  
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1 Court of Appeals under Ninth Circuit Rule 22-3, and administratively closed the action on July  
2 27, 2017. *Id.* at Dkts. 24, 27.

3 Now, over sixteen years after filing his first petition, Petitioner filed a proposed fourth  
4 petition. Dkt. 1-1 The Court now screens the proposed fourth petition to determine whether  
5 ordering service upon Respondent is appropriate under Rule 4 of the Habeas Rules.

## 6 **II. Legal Standard**

7 Under Rule 4 of the Habeas Rules, the Court is required to perform a preliminary review  
8 of habeas petitions. The Rule specifically directs the Court to dismiss a habeas petition before the  
9 respondent is ordered to file a response, if it “plainly appears from the petition and any attached  
10 exhibits that the petitioner is not entitled to relief in the district court.” Specifically, “dismissal is  
11 required on procedural grounds, such as failure to exhaust or untimeliness, or on substantive  
12 grounds where the claims are ‘vague,’ ‘conclusory,’ ‘palpably’ incredible,’ or ‘patently frivolous  
13 or false.’” *Neiss v. Bludworth*, 114 F.4th 1038 (9th Cir. 2024) (quoting *Blackledge v. Allison*, 431  
14 U.S. 63, 75–76 (1977)).

15 A petition must also comply with the other Habeas Rules. Under Rule 2(a) of the Habeas  
16 Rules, “the petition must name as respondent the state officer who has custody.” Further, the  
17 petition must:

18 (1) specify all the grounds for relief available to the petitioner; (2) state the facts  
19 supporting each ground; (3) state the relief requested; (4) be printed, typewritten, or  
20 legibly handwritten; and (5) be signed under penalty of perjury by the petitioner or  
person authorized to sign it for the petitioner under 28 U.S.C. § 2242.

21 *Id.* at Rule 2(c). The petition must “substantially follow” a form prescribed by the local district  
22 court or the form attached to the Habeas Rules. *Id.* at Rule 2(d). Finally, Rule 9 of the Habeas  
23 Rules provides:

1 Before presenting a second or successive petition, the petitioner must obtain an  
2 order from the appropriate court of appeals authorizing the district court to consider  
the petition as required by 28 U.S.C. § 2244(b)(3) and (4).

3 Failure to obtain circuit court approval deprives the district court of jurisdiction over a  
4 successive petition and necessitates dismissal. *See Magwood v. Paterson*, 561 U.S. 320,  
5 331 (2010).

### 6 **III. Discussion**

7 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) implemented a  
8 gatekeeper function, requiring that successive § 2254 petitions be dismissed unless they meet one  
9 of the exceptions outlined in 28 U.S.C. § 2244(b)(2).

10 “The bar of successive petitions applies only to petitions adjudicated and denied on the  
11 merits in the previous federal habeas corpus proceeding.” *Turner v. Terhune*, 78 F. App’x 29, 30  
12 (9th Cir. 2003) (citing *Steward v. Martinez-Villareal*, 523 U.S. 637, 645 (1998)). “A disposition  
13 is ‘on the merits’ if the district court either considers and rejects the claims or determines that the  
14 underlying claim will not be considered by a federal court.” *McNabb v. Yates*, 576 F.3d 1028,  
15 1029 (9th Cir. 2009) (citing *Howard v. Lewis*, 905 F.3d 1318, 1322 (9th Cir. 1990)). Thus,  
16 adjudication on the merits occurs when a prior petition is dismissed with prejudice because a  
17 procedural default forecloses review by federal courts. *McNabb*, 576 F.3d at 1029. If a prior  
18 petition was a “mixed petition” raising both exhausted and unexhausted claims, the dismissal of  
19 any claim with prejudice will trigger the bar of successive petitions. *Burton v. Stewart*, 549 U.S.  
20 147, 154 (2007). Additionally, when a prior habeas petition is dismissed as untimely, the  
21 dismissal constitutes a resolution on the merits and a permanent bar to successive petitions.  
22 *McNabb*, 576 F.3d at 1030.

23 “A habeas petition is second or successive only if it raises claims that were or could have  
24 been adjudicated on the merits” in the prior petition. *Id.* at 1029; *see also* 28 U.S.C. § 2244

1 (claims are successive and barred unless the petitioner shows the claim “relies on a new rule of  
2 constitutional law” or “the factual predicate for the claim could not have been discovered  
3 previously through the exercise of due diligence.”).

4 Before a petitioner is allowed to file a second or successive petition, he must obtain an  
5 order from the Court of Appeals authorizing the district court to consider the petition. 28 U.S.C.  
6 § 2244(b)(3); Rule 9 of the Habeas Rules; Ninth Circuit Rule 22-3; *see also Woods v. Carey*, 525  
7 F.3d 886, 888 (9th Cir. 2008). In the absence of an such an order authorizing review, a district  
8 court lacks jurisdiction to consider a second or successive petition. *See Magwood*, 561 U.S. at  
9 331; *Burton*, 549 U.S. at 157. Stated another way, this Court is unable to review habeas claims  
10 that could have been brought in a prior petition, unless the petitioner first obtains permission  
11 from the Ninth Circuit to file a successive petition.

12 Accordingly, in determining whether it can consider a potentially successive petition, the  
13 Court asks three questions: (1) was a prior petition adjudicated on the merits? (2) could the  
14 habeas claims raised in the new petition have been raised in a prior petition? and (3) did the  
15 petitioner obtain permission to file the new petition? If the first and second questions are  
16 answered in the affirmative, the answer to the final question must also be “yes.” Otherwise, the  
17 Court lacks jurisdiction, and the successive petition must be dismissed.

18 Here, the answer to the first question is “yes.” Petitioner’s second petition was a “mixed  
19 petition,” raising both exhausted and unexhausted claims, and his exhausted claims were denied  
20 on the merits as untimely, procedurally barred, and nonviable. *Kinney*, No. 2:13-cv-00441-JCC,  
21 at Dkts. 7, 10, 11.

22 Thus, the Court proceeds to the second question: could the habeas claims brought in the  
23 proposed fourth petition have been raised in the second petition? If true, the factual predicate of  
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Petitioner's requests for relief in the fourth petition (*i.e.*, that he was acting as an undercover government operative when he committed the underlying offense) would have been known to him at the time he filed his second petition.<sup>1</sup> In fact, this is the same factual predicate for Petitioner's requests for relief in his third petition, which this Court finds to be successive. *See Kinney*, No. 2:17-cv-01040-RAJ, at Dkt. 4 at 9 (asserting that, at the time of his conviction and arrest, Petitioner was acting under orders of the United States President and thus entitled to absolute immunity for his crimes). As with his successive third petition, Petitioner does not sufficiently explain why the claims presented here could not be raised in his second petition. He merely avers that, over the past twenty years, various bad actors interfered with his ability to send and receive legal mail. *See* Dkt. 1-1. Thus, the Court finds the answer to the second question is "yes" as claims asserted in the proposed fourth petition could have been brought in a prior petition.

Therefore, the Court proceeds to the third and final question: did Petitioner obtain permission before filing his proposed fourth petition? The answer is "no." There is no evidence or allegation Petitioner obtained permission from the Circuit Court before filing his proposed fourth petition. Petitioner's failure to obtain Circuit Court permission deprives the Court of jurisdiction over his successive petition. Accordingly, the undersigned recommends dismissing this action without prejudice for lack of jurisdiction.

#### **IV. Certificate of Appealability**

Petitioner may only appeal a district court's dismissal of his federal habeas petition after obtaining a certificate of appealability (COA) from a district or circuit judge. *See* 28 U.S.C. §

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<sup>1</sup> The Court need not accept fanciful or delusional allegations as true. *Dopp v. FBI*, No. 2:20-CV-00063-BLW, 2020 WL 8836046, at \*1 (D. Idaho June 25, 2020) (noting that claims that are "implausible, frivolous, [and] fanciful" are subject to summary dismissal under Rule 4 of the Habeas Rules). However, whether Petitioner has stated a viable claim for relief in his successive petition is beyond the scope of this report and recommendation.

2253(c). “A certificate of appealability may issue...only if the [petitioner] has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Reasonable jurists would not find it debatable that the proposed fourth petition is second or successive and that this action should be dismissed for lack of jurisdiction. Therefore, Petitioner is not entitled to a certificate of appealability with respect to his proposed fourth petition.

#### V. Conclusion

For the reasons outlined above, Petitioner is not entitled to habeas relief as the Court lacks jurisdiction over his proposed fourth petition. Thus, in accordance with Rule 4 of the Habeas Rules, the Court declines to serve the petition and, instead, recommends this action be dismissed without prejudice, the IFP motion (Dkt. 1) be denied as moot, and a certificate of appealability be denied in this case.

As explained above, if Petitioner wishes to file a second or successive petition in this Court, he must first obtain an order from the Court of Appeals authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A); Rule 9 of the Rules Governing Section 2254 Proceedings for the United States District Court.

Objections to this Report and Recommendation, if any, should be filed with the Clerk not later than **fourteen (14) days** from the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections

1 should be noted for consideration on the District Judge's motions calendar **fourteen (14) days**  
2 from the date they are filed. Responses to objections may be filed by **the day before the noting**  
3 **date**. If no timely objections are filed, the matter will be ready for consideration by the District  
4 Judge on **November 6, 2024**.

5 Dated this 22nd day of October, 2024.

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8 David W. Christel  
9 United States Magistrate Judge  
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